

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HERBERT WARREN,

Plaintiff,

vs.

NEVADA COACHES, LLC, DBA
SHOWTIME TOURS,

Defendants.

2:06-CV-0035-RCJ-LRL

ORDER

This matter comes before the Court on Defendants' Motion for Summary Judgment (#12). Plaintiff claims that Defendants terminated his employment in violation of the Age Discrimination Employment Act. Defendants now seek summary judgment, arguing that Plaintiff has not met a prima facie case of age discrimination. The Court has considered the motions, the pleadings on file, and oral argument on behalf of all parties. Pursuant to the following analysis, Defendants' Motion for Summary Judgment is *denied*.

BACKGROUND

This is an age discrimination case arising out of the termination of Plaintiff Herbert Warren. Plaintiff was hired by Defendant Showtime Tours on May 24, 2003 as President of the company. Plaintiff was 59 years old when hired. Defendant terminated Plaintiff's employment on January 11, 2005, when Plaintiff was 61. Defendant hired James Capezio, age 41, to fill the vacancy ten days later. Plaintiff believes he was fired because of age discrimination and filed a Charge of Discrimination with the Nevada Equal Rights Commission ("NERC") on February

1 10, 2005. In the Charge, Plaintiff alleges that Showtime's owner, Bill La Macchia Jr., met with
2 him in July 2004 and communicated that he wanted "someone around long enough to see the
3 project completed." (#1 at 3.) La Macchia allegedly also questioned Plaintiff regarding his age,
4 why he was still working, and when he planned on retiring. (*Id.*) Plaintiff claims that he was
5 harassed repeatedly from that time, and La Macchia made several comments suggesting
6 Plaintiff's age was a problem. Plaintiff further contends that Defendant "systematically
7 eliminated all the older employees from the company and replac[ed] them with younger
8 employees." (*Id.*) Plaintiff attaches evidence showing that of the seven Showtime employees
9 (beside himself) discharged during the applicable period of alleged discrimination (August 2004
10 to January 2005), five were over 50 years old and one was 45. (#16 at 21.)

11 On September 26, 2005, the NERC closed the charge, finding that "the evidence did not
12 meet the legal criteria for establishing that discriminatory acts occurred." (Ex. 7 to #12 at 2.)
13 The NERC also issued Plaintiff a Right to Sue letter at that time. On January 10, 2006, Plaintiff
14 filed suit with this Court alleging violation of the Age Discrimination Employment Act
15 ("ADEA"). His brief Complaint incorporates the NERC Charge, but includes no additional
16 facts. Plaintiff seeks damages and reinstatement with backpay. Defendant now brings a Motion
17 for Summary Judgment (#12), alleging that Plaintiff's claims are factually and legally
18 unsupported.

19 **I. Summary Judgment Standard of Review**

20 The purpose of summary judgment is to avoid unnecessary trials when there is no dispute
21 as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
22 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is proper if the evidence shows that there
23 is no genuine issue as to any material fact and the moving party is entitled to judgment as a
24 matter of law. Fed. R. Civ. P. 56©; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where
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1 reasonable minds could differ on the material facts at issue, summary judgment is not
2 appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). As summary
3 judgment allows a court to dispose of factually unsupported claims, the court construes the
4 evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazari*, 84 F.3d 1194,
5 1197 (9th Cir. 1996).

6 The moving party bears the burden of informing the court of the basis for its motion,
7 together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex*,
8 477 U.S. at 323. Once the moving party has met its burden, the party opposing the motion may
9 not rest on the mere allegations or denials of its pleadings, but must set forth specific facts
10 showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
11 248 (1986). When the nonmoving party bears the burden of a claim or defense at trial, the
12 moving party can meet its initial burden on summary judgment by showing that there is an
13 absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325.
14 Conversely, when the moving party bears the burden of proof at trial, then it must establish each
15 element of its case at summary judgment.

16 **II. Analysis**

17 Defendant moves for summary judgment on three grounds. First, it claims that the
18 NERC's decision precludes re-litigation of the issues under issue preclusion. Second, it argues
19 that Plaintiff's Complaint is factually inadequate. Third, Defendant contends that Plaintiff's
20 claims are substantively defective because Plaintiff has not established a prima facie case of
21 discrimination. Defendant errs in all three grounds.

22 **A. Issue Preclusion**

23 Defendant claims that Plaintiff's age discrimination claims are barred because the NERC
24 already determined that Defendant's actions did not amount to discrimination. In support of its
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1 argument, Defendant cites to several cases where courts have held that various state
2 administrative decisions bar further litigation under collateral estoppel. *See, e.g., Edmundson*
3 *v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993) (plaintiff barred from further litigation
4 of Section 1983 discrimination claim after Commonwealth Court upheld Unemployment Board's
5 decision dismissing the claim); *Lejeune v. Clallam County*, 823 P.2d 1144 (Wash. App. 1992)
6 (Board of Commissioner's decision disapproving property owner's plat application barred further
7 proceedings on same plat). Defendant's argument overlooks controlling case law that authorizes
8 Plaintiff's suit in federal court. The very case that Defendant principally relies upon, the Third
9 Circuit's ruling in *Edmundson*, notes that "Congress has indicated that agency factual findings
10 are not conclusive . . . in the instances of Title VII, and the Age Discrimination Act," and issue
11 preclusion is therefore not appropriate in these situations. *Edmundson*, 4 F.3d at 191 (citing
12 *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 112-13 (1991) (holding that ADEA
13 actions are not subject to the preclusive effect of earlier administrative findings on age
14 discrimination)); *see also Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 470 (1982) (finding
15 that it is not "plausible to suggest that congress intended federal courts to be bound further by
16 state administrative decisions" and such decisions "do not preclude trial de novo in federal
17 court"). Therefore, Plaintiff's "Right to Sue" letter gives him an unqualified right to bring his
18 action in federal court.

19 **B. Sufficiency of Plaintiff's Complaint**

20 Defendant also contends that Plaintiff's Complaint is too bare to pass the notice pleading
21 requirements of Federal Rule of Civil Procedure 8(a). Rule 8(a) imposes only liberal pleading
22 requirements on plaintiffs. "A court may dismiss a complaint only if it is clear that no relief
23 could be granted under any set of facts that could be consistent with the allegations."
24 *Swierkiewicz v. Soema N.A.*, 534 U.S. 506, 510-12 (2002). The Supreme Court has rejected

1 imposing a heightened pleading requirement on Title VII cases, holding that a complaint is
2 sufficient if it “detailed the events leading to his termination, provided relevant dates, and
3 included the ages and nationalities of at least some of the relevant persons involved with his
4 termination.” *Id.* In this case, Plaintiff’s Complaint is scarce in factual detail, only alleging that
5 Plaintiff was discharged by Defendant “primarily because of his age.” (#1 at 1-2.) However,
6 Plaintiff’s Complaint does incorporate the factual allegations contained in his NERC Charge.
7 As previously detailed, this Charge fleshes out Plaintiff’s story, by providing details of
8 discriminatory statements made by Defendant’s owner, giving the ages of younger hired
9 employees, and alleging that the owner openly planned to and did eliminate older workers. The
10 Charge contains dates that identify when these events purportedly occurred. Therefore, while
11 Plaintiff’s Complaint is admittedly bare, the incorporated allegations from the Charge provide
12 enough factual detail to fulfill the notice pleading requirements of Rule 8(a).

13 C. Plaintiff’s Substantive Case

14 The Ninth Circuit has held that the “shifting burden of proof applied to a Title VII
15 discrimination claim also applies to claims arising under the ADEA.” *Rose v. Wells Fargo &*
16 *Co.*, 902 F.2d 1417, 1420 (9th Cir. 1990). Therefore ADEA claims are analyzed in three steps:
17 (1) the plaintiff must establish a prima facie case of age discrimination; (2) if the plaintiff has
18 met his burden, the employer must articulate a legitimate, nondiscriminatory reason for its
19 actions; and (3) the burden then shifts back to plaintiff to show that the employer’s alleged
20 nondiscriminatory reason is pretextual. *Id.* at 1420-1421; *McDonnell Douglas Corp. v. Green*,
21 411 U.S. 792, 802-04 (1973). A plaintiff establishes a prima facie case of discrimination by
22 proving: (1) he belongs to a protected class; (2) he performed his job satisfactorily; (3) he
23 suffered an adverse employment action; and (4) the employer discriminated against plaintiff by
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1 treating differently than a similarly situated employee. *Cornwell v. Electra Cent. Credit Union*,
2 439 F.3d 1018, 1028 (9th Cir. 2006).

3 In this case, Plaintiff has clearly alleged elements (1) and (3) of his prima facie case.
4 Plaintiff was 61 years old, was terminated, and was replaced by someone twenty years his junior.
5 These facts are not disputed. As to element (2), that he was performing his job satisfactorily,
6 Plaintiff alleges he was “performing a stellar job” for Defendant but offers no substantive
7 evidence. Defendant brings no evidence that Plaintiff was performing his job poorly. Reading
8 the record in the light most favorable to Plaintiff, the Court assumes that Plaintiff was
9 performing his job adequately.

10 Defendant contends that Plaintiff cannot establish element (4) because he was replaced
11 by someone within the protected class. After Plaintiff was fired, Showtime replaced him with
12 James Capezio, age 41. Under the ADEA, anyone over age 40 is in the protected class, so
13 technically, Plaintiff was replaced by an employee also within the protected age class – even if
14 over twenty years his junior. On this issue, the Supreme Court has clearly held that being
15 replaced by someone from outside the protected class is not a mandatory requirement of an
16 ADEA suit. *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996). In
17 *O’Connor*, the Court rejected the argument here made by Defendants, concluding that:

18 the fact that one person in the protected class has lost out to another person in the
19 protected class is thus irrelevant, so long as he has lost out *because of his age*. .
20 . . . Because the ADEA prohibits discrimination on the basis of age and not class
21 membership, the fact that a replacement is substantially younger than the plaintiff
22 is a far more reliable indicator of age discrimination than is the fact the plaintiff
23 was replaced by someone outside the protected class.

24 *Id.* at 312-13 (emphasis in original). In this case, Plaintiff was replaced by someone
25 “substantially younger,” despite the fact the replacement was also within the protected class.

1 Following the Court's holding in *O'Connor*, Plaintiff has fulfilled element (4) in alleging he was
2 treated substantially differently due to age discrimination.

3 Plaintiff has therefore satisfactorily plead the four elements required in an ADEA suit and
4 the burden shifts to Defendant to offer some non-discriminatory reason for the termination.
5 Defendant submits that Plaintiff was an at-will employee, subject to termination at any time for
6 any reason, and was fired for poor performance. Defendant also notes that it hired Plaintiff when
7 he was 59 years old, demonstrating that they did not discriminate against older individuals for
8 employment purposes.

9 However, Plaintiff argues that these reasons for his termination are pretext and offers
10 evidence that after he was hired, Showtime transitioned company control to a new owner, La
11 Macchia Jr., who was focused on bringing younger employees to the company. For instance,
12 Plaintiff testifies that La Macchia Jr. asked Defendant his age, why he was still working, and
13 when he planned on retiring. Plaintiff contends that after this conversation, La Macchia
14 "routinely told me that I would not be with the company long" and "indirectly made comments
15 to me that suggested my age was a problem for him." (#1 at 3.) In his deposition, Plaintiff states
16 that he has a tape recording of La Macchia leaving a message on his answering machine stating
17 that he wanted another employee fired and commenting on his age. (Ex. 8 to #12 at 5.) He also
18 testified that La Macchia often said things like, "We need younger blood. We need fresh blood."
19 (*Id.*) Plaintiff has attached evidence that of the seven Showtime employees (beside himself)
20 discharged during the applicable period of alleged discrimination (August 2004 to January 2005),
21 five were over 50 years old and another was 45. (#16 at 21.)

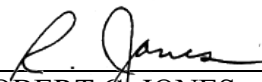
22 Plaintiff's evidence appears sufficient to raise a question of material fact as to whether
23 Defendant's stated reasons for his termination are pretextual. While Plaintiff has not offered
24 abundant proof of discrimination, he has identified discriminatory statements made by

1 Defendant's agents and shown that Defendant fired several older employees contemporaneous
2 with his termination. The fact Defendant was hired when 59 does cut against a finding of
3 discriminatory intent, but it is possible that Defendant subsequently changed its policies to
4 discourage retention of older employees. Therefore, Plaintiff's case should survive summary
5 judgment.

6 **CONCLUSION**

7 IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (#12) is
8 *denied*. Plaintiff has adequately plead a prima facie case and shown that Defendant's stated
9 reasons for the termination might be pretextual. Furthermore, his case is not barred by issue
10 preclusion. As such, the case should survive summary judgment and proceed to the merits.

11 DATED: July 13, 2007

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16 ROBERT C. JONES
17 UNITED STATES DISTRICT JUDGE
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